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PP v. ROMI ALI & ANOR

COURT OF APPEAL, PUTRAJAYA
VARGHESE GEORGE JCA
VERNON ONG LAM KIAT JCA
ZAMANI A RAHIM JCA
B [CRIMINAL APPEAL NO: S-05-31-02-2014]
22 SEPTEMBER 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Accused persons jointly charged for trafficking in 1115.96g of methamphetamine – Whether*
C *prosecution proved direct trafficking by transporting – Whether first accused had possession and presumed knowledge of drugs – Whether trial judge correct in reducing charge against first accused to one of possession – Whether prima facie case established against second accused – Dangerous Drugs Act 1952 ss. 2, 12(2), 39B(1)(a), 39A(2)*

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CRIMINAL PROCEDURE: *Appeal – Appeal by prosecution – Appeal against reduction of charge and order of acquittal – Whether prosecution proved direct trafficking by transporting – Whether first accused had possession and presumed knowledge of drugs – Whether trial judge correct in reducing charge against first*
E *accused to one of possession – Whether prima facie case established against second accused – Whether trial judge correct in acquitting and discharging second accused – Whether first and second accused had common intention to commit offence of trafficking*

Upon receiving information pertaining to a drug trafficking activity that was
F going to take place, PW2 together with PW5 proceeded to a river bank at Tanjung Batu. Consequently, a Proton Iswara ('car') entered the ambush position. The driver was the second respondent, whilst the passenger at the front seat was the first respondent. Subsequently, the first respondent and the second respondent were arrested. PW2 conducted a search in the car and found a black bag ('exh. P37') in the footwell of the front passenger seat
G where the first respondent was seated and placed close to his legs. PW2 examined exh. P37 and found it to contain two plastic packets of 'Ali Café Power Root 5 Dalam 1'. In the first and second Ali Café plastic packets, PW2 found further plastic packets which contained crystalline substances. Thereafter, PW2 proceeded to frisk the first respondent's body and found
H another two small plastic packets which also contained similar substance. However, nothing incriminating was found on the second respondent. It was later confirmed that the substances were methamphetamine weighing a total amount of 1,115.96g. Thereafter, the first and second respondents were jointly charged for having common intention of trafficking in dangerous
I drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Another amended charge of possession of drugs punishable under s. 12(3) of the Act was proffered against the first respondent. The trial judge found that the prosecution had failed to prove direct trafficking by transporting under s. 2 of the Act to constitute the offence of trafficking in dangerous drugs under

s. 39B(1)(a) of the Act against the first respondent. However, the trial judge found that first respondent had possession and presumed knowledge of the drugs under s. 37(d) of the Act. As against the second respondent, the trial judge found that the second respondent was a mere driver of the car and there was no evidence that the second respondent was in custody or control of the drugs in exh. P37. The trial judge further held that the liability of the first respondent could not be fastened or imputed to the second respondent based on the principle of common intention under s. 34 of the Penal Code as there was insufficient evidence to prove any pre-arranged plans. Therefore, the trial judge, at the close of the prosecution's case, reduced the trafficking charge against the first respondent to one of possession punishable under s. 39A(2) of the Act. As regards to the second respondent, the trial judge found that there was no *prima facie* case established against him, and therefore, acquitted and discharged the second respondent. Dissatisfied, the prosecution appealed against the said decision on the grounds, *inter alia*, that as both the second and first respondents attempted to flee at the time of their arrest, common intention had arisen, in that, both of them had knowledge of the said drugs.

Held (setting aside decision of High Court against first respondent; affirming decision of High Court against second defendant)
Per Zamani A Rahim JCA delivering the judgment of the court:

(1) The prosecution had proved its case of trafficking against the first respondent by transporting under s. 2 of the Act. Therefore, the decision of the trial judge in reducing the charge under s. 39A(2) of the Act was set aside and the case against the first respondent was ordered to be remitted back to the High Court for his defence to be called on an amended trafficking charge under s. 39B(1)(a) of the Act. (para 21)

(2) It was the trial judge's decision that the prosecution had failed to prove that the second respondent was in possession of the impugned drugs. Further, the clothings found in exh. 37 did not fit the second respondent but fitted the first respondent. It was therefore reasonable to infer that the clothings together with the drugs in exh. P37 belonged to or were in the possession of the first respondent only. (para 22)

(3) There was insufficient evidence adduced by the prosecution to prove that the second respondent was in custody or control of the drugs in exh. P37. There was also serious doubt regarding whether the second respondent did actually make an attempt to escape at the time of his arrest. The evidence of PW5 had contradicted the evidence of PW2 on this issue. Other than being the driver of the car, there was no other evidence to show the second respondent's nexus with exh. P37 and also his knowledge of the drugs in exh. P37. (para 24)

(4) The prosecution failed to prove presumed knowledge under s. 37(d) of the Act against the second respondent. The evidence and the circumstances of the case was completely lacking to establish common

A intention between the second respondent and the first respondent to jointly traffic the said drugs. Therefore, the trial judge was not in error in finding that the prosecution had failed to prove custody or control and presumed knowledge of the drugs under s. 36(d) of the Act against the second respondent, let alone to fasten the second respondent with
B 'common intention'. Thus, the trial judge's decision to acquit the second respondent at the close of the prosecution's case was correct as no *prima facie* case of trafficking had been proven. (paras 24 & 25)

Bahasa Malaysia *Translation Of Headnotes*

C Setelah menerima maklumat berkaitan aktiviti pengedaran dadah yang akan mengambil tempat, PW2 bersama-sama dengan PW5 telah menuju ke tebing sungai di Tanjung Batu. Selepas itu, sebuah kereta Proton Iswara ('kereta') telah memasuki kedudukan serang hendap. Pemandu merupakan responden kedua, manakala penumpang di tempat duduk hadapan merupakan responden pertama. Responden pertama dan responden kedua kemudiannya
D telah ditangkap. PW2 telah menjalankan carian dalam kereta dan mendapati sebuah beg hitam ('eks. P37') di tempat letak kaki di mana responden pertama duduk dan diletakkan berhampiran dengan kakinya. PW2 telah memeriksa eks. P37 dan mendapati ia mengandungi dua bungkusan plastik 'Ali Café Power Root 5 Dalam 1'. Di dalam paket plastik Ali Café pertama
E dan kedua, PW2 selanjutnya menemui paket plastik yang mengandungi bahan kristal. Seterusnya, PW2 menjalankan pemeriksaan badan responden pertama dan menemui dua lagi paket plastik yang mengandungi bahan yang sama. Tiada apa-apa yang disyaki dijumpai daripada responden kedua. Adalah disahkan bahawa bahan-bahan tersebut merupakan
F methamphetamine seberat 1,115.96g. Berikutan itu, responden pertama dan responden kedua telah dipertuduh secara bersesama dengan mempunyai niat bersama untuk mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Satu lagi tuduhan pindaan pemilikan dadah yang boleh dihukum di bawah s. 12(3) Akta telah dikenakan terhadap responden
G pertama. Hakim bicara telah mendapati bahawa pihak pendakwaan gagal membuktikan pengedaran langsung dengan mengangkut di bawah s. 2 Akta untuk membentuk kesalahan pengedaran dadah berbahaya di bawah s. 39B(1)(a) Akta terhadap responden pertama. Walau bagaimanapun, hakim bicara mendapati bahawa responden pertama mempunyai milikan dan
H anggapan pengetahuan mengenai dadah di dalam eks. P37 di bawah s. 37(d) Akta tersebut. Berkenaan responden kedua, hakim bicara mendapati bahawa responden kedua hanya pemandu kereta tersebut dan tidak ada keterangan bahawa responden kedua mempunyai jagaan atau kawalan dadah di dalam eks. P37. Hakim bicara selanjutnya memutuskan bahawa liabiliti responden pertama tidak boleh dibuat atau dikaitkan dengan responden kedua
I berdasarkan prinsip niat bersama di bawah s. 34 Kanun Keseksaan kerana tidak terdapat keterangan yang mencukupi untuk membuktikan apa-apa rancangan yang diatur terlebih dahulu. Oleh itu, hakim bicara, di akhir kes pendakwaan, telah mengurangkan pertuduhan pengedaran terhadap

responden pertama kepada pemilikan yang boleh dihukum di bawah s. 39A(2) Akta. Untuk responden kedua, hakim bicara mendapati tiada kes *prima facie* dibuktikan terhadapnya, dan oleh itu, melepaskan dan membebaskan responden kedua. Tidak berpuas hati, pihak pendakwaan telah merayu terhadap keputusan tersebut atas alasan, antara lain, bahawa oleh kerana responden pertama dan kedua telah cuba melarikan diri pada masa mereka ditangkap, niat bersama telah timbul, dalam itu, kedua-dua mereka mempunyai pengetahuan mengenai dadah di dalam kereta tersebut.

Diputuskan (mengenepikan keputusan Mahkamah Tinggi terhadap responden pertama; mengesahkan perintah pembebasan dan pelepasan Mahkamah Tinggi terhadap defendan kedua)
Oleh Zamani A Rahim HMR menyampaikan penghakiman mahkamah:

(1) Pihak pendakwaan berjaya membuktikan kes pengedaran terhadap responden pertama dengan mengangkut bawah s. 2 Akta. Oleh itu, keputusan hakim bicara dalam mengurangkan pertuduhan di bawah s. 39A(2) Akta telah diketepikan dan kes terhadap responden pertama telah diperintahkan supaya dikembalikan semula ke Mahkamah Tinggi untuk pembelaan dipanggil berdasarkan pertuduhan pengedaran terpinda di bawah s. 39B(1)(a) Akta.

(2) Adalah keputusan hakim bicara bahawa pihak pendakwaan telah gagal membuktikan bahawa responden kedua mempunyai milikan dadah yang dipersoalkan. Di samping itu, pakaian yang dijumpai di dalam eks. 37 tidak berpadanan untuk responden kedua tetapi berpadanan untuk responden pertama. Adalah munasabah untuk membuat kesimpulan bahawa pakaian tersebut bersama-sama dengan dadah di dalam eks. P37 adalah kepunyaan atau dalam milikan responden pertama sahaja.

(3) Tidak terdapat keterangan mencukupi yang dikemukakan oleh pihak pendakwaan untuk membuktikan bahawa responden kedua mempunyai jagaan atau kawalan dadah-dadah di dalam eks. P37. Terdapat juga keraguan yang serius mengenai sama ada responden kedua benar-benar cuba melarikan diri pada masa tangkapan dibuat. Keterangan PW5 telah bercanggah dengan keterangan PW2 mengenai isu ini. Selain daripada menjadi pemandu kereta tersebut, tiada bukti lain untuk menunjukkan pertalian responden kedua dengan eks. P37 dan juga pengetahuan responden kedua mengenai dadah di dalam eks. P37.

(4) Pihak pendakwaan gagal membuktikan anggapan pengetahuan di bawah s. 37(d) Akta terhadap responden kedua. Keterangan dan hal keadaan kes amat tidak mencukupi untuk mewujudkan niat bersama antara responden kedua dan responden pertama untuk bersama-sama mengedar dadah tersebut. Oleh itu, hakim bicara tidak terkhilaf dalam membuat dapatan bahawa pihak pendakwaan gagal membuktikan jagaan atau kawalan dan anggapan pengetahuan tentang dadah tersebut di bawah s. 37(d) Akta terhadap responden kedua, apatah lagi untuk mengaitkan

responden kedua dengan 'niat bersama'. Oleh itu keputusan hakim bicara untuk membebaskan responden kedua di akhir kes pendakwaan adalah betul kerana tiada kes *prima facie* pengedaran telah terbukti.

Case(s) referred to:
Jamaluddin Saad & Anor v. PP [2013] 1 LNS 481 CA ***(refd)***
Jonaidi Mansor v. PP [2002] 1 CLJ 730 CA ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC ***(refd)***
PP v. Mohd Bandar Shah Nordin & Anor [2008] 4 CLJ 859 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 12(3), 36(d), 37(d), 39A(2), 39B(1)(a)
Penal Code, s. 34

For the appellant - Muhamad Yasser Mohd Nasri; DPP
For the 1st respondent - Ram Singh; M/s Ram Singh Harbans & Co
For the 2nd respondent - Chau Chin Tang; M/s Chau & Thien

[Appeal from High Court, Tawau; Criminal Trial No: TWU-45-6-6 & 7-6-2013]

Reported by Sandra Gabriel

JUDGMENT

Zamani A Rahim JCA:

Introduction

[1] Romi bin Ali, the first respondent and Rosliansa bin Kitley, the second respondent were jointly charged with having a common intention of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). The trafficking charge against both of them reads:

> Bahawa kamu pada 4hb Februari 2013 lebih kurang jam 6.40 pagi bertempat di tebing Sungai Pasir Putih, Tanjung Batu, Logpond, di dalam Daerah Tawau, di dalam Negeri Sabah, dalam melaksanakan niat bersama, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 1,155.96 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[2] Another amended charge of possession of drugs punishable under s. 12(3) of the Act was proffered against the first respondent alone and the charge reads:

> Bahawa kamu pada 4hb Februari 2013 lebih kurang jam 6.40 pagi bertempat di tebing Sungai Pasir Putih, Tanjung Batu, Logpond, di dalam Daerah Tawau, di dalam Negeri Sabah, dalam memiliki dadah berbahaya iaitu Methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama.

The Prosecution's Case

[3] On 4 April 2013, at about 2am, a police marine from Tawau, Copral Justin bin Lakai (PW2) together with Copral Isaac Amirul (PW5) and Constable Alexise proceeded to a river bank at a place known as "Logpond" at Tanjung Batu. They went there in a civilian motorcar to verify an information received by PW2 pertaining to drugs trafficking activities that was going to take place there.

[4] Having taken their position there, at about 6.40am, a green Proton Iswara bearing Registration No. SS7921F entered the ambush position and parked next to the marine police personnel's motorcar. There were two persons inside the Iswara motorcar. The driver was identified as Rosliansa bin Kitley (the second respondent), whilst the passenger at the front seat was identified as Romi bin Ali (the first respondent).

[5] The second respondent came out from the Iswara motorcar and walked towards the river bank where he was arrested by PW5. When the first respondent was about to alight from the Iswara motorcar, he was arrested by PW2. According to PW2, the first respondent was attempting to flee.

[6] PW2 conducted a search of the Iswara motorcar and found a black bag of "Quiksilver" brand, exh. P37, in the footwell of the front passenger seat where the first respondent was seated. Exhibit P37 had been placed close to the first respondent's legs. PW2 examined P37 and found it to contain two plastic packets of "Ali Café Power Root 5 Dalam 1". In the first Ali Café plastic packet, PW2 found 11 translucent plastic packets containing crystalline substances suspected to be methamphetamines. In the second Ali Café plastic packet, PW2 found two silver-coloured plastic packets containing similar crystalline substances suspected to be methamphetamines.

[7] After the discovery of the suspected drugs, PW2 proceeded to frisk the first respondent body and found another two small translucent plastic packets in the right front pocket of the jeans worn by the first respondent. These two small plastic packets also contained similar substance suspected to be the drugs methamphetamines.

[8] Nothing incriminating was found on the person of the second respondent, other than the keys of the Iswara motorcar. The keys were seized from him.

[9] All the exhibits were seized and both the respondents were subsequently taken to the Marine's Base at Tawau where a police report *vide* Tawau Rpt. No: 1963/12, P13 was lodged by PW2.

[10] The suspected drugs and other related items were handed over to the investigating officer, Insp. Nalini a/p Narkeyah (PW6) at about 12.30pm on the same day.

[11] The suspected drugs in Ali Café plastic packets marked J1 to J11 and K1 and K2 were sent to the Chemistry Department at Kota Kinabalu on 6 February 2013 for analysis. Upon analysis by the government chemist, Biling anak Peter Raig (PW1), it was confirmed that the substances were methamphetamines, a dangerous drug as listed in the First Schedule of the Dangerous Drugs Act 1952, weighing a total amount of 1,115.96g.

Findings Of The Trial Judge

[12] The trial judge found that the prosecution has failed to prove direct trafficking by "transporting" under s. 2 of the Act to constitute the offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Act: see Gopal Sri Ram JCA (as he then was) in *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65 which summarised the law as enunciated by Lord Diplock in *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* [1980] 1 LNS 181. The trial judge wrote at pp. 190-191 of the appeal record as follows:

> From the evidence adduced in the instant case, there is no evidence from where the accused persons were alleged to have transported the said drugs to the scene at Logpond. Evidence only shows that the 2nd accused was driving the said green Proton Iswara (P11) with the 1st accused seated at the front passenger seat arriving at Logpond. Although there is evidence from the owner of the said car that the 2nd Accused who is his wife's brother-in-law, had come to his house with another person to take the said car as there was someone who was interested to buy the said car and wanted to see it but the other person who came along with the 2nd accused was not identified whether he was the 1st accused or some other person by the owner of the car. There was also no evidence that the 2nd accused and/or the other companion was/were seen to have placed the black bag containing the drugs inside the car particularly at the floor of the front passenger seat after the 2nd accused was handed the ignition key of the car. Hence, there is absolutely no valid reason to draw any inference that the drugs were "transported" from the house of the car owner to Logpond. This basic element of transporting from one point to another is clearly not proved at the end of the P.P's case. In addition, there is not an iota of evidence to show "any transaction that the accused proposed to enter into" as stated in Mohamad Yazri Minhat's case (*supra*). To echo the words of His Lordship Gopal Sri Ram as cited above "the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker". The same position should apply in the instant case.

[13] However, the trial judge found that a reasonable inference can be drawn that the first respondent had knowledge of the drugs in exh. P37, though His Lordship doubted the evidence of PW2 that the first respondent attempted to flee. The trial judge, however, found that the first respondent was having custody or control of exh. P37 containing the drugs which was recovered from the footwell of the front passenger seat where the first respondent was seated. The first respondent, therefore, had possession and presumed knowledge of the drugs in exh. P37 under s. 37(d) of the Act.

[14] As against the second respondent, the trial judge found there was no evidence that he was in custody or control of the drugs in exh. P37. He was a mere driver of the Iswara motorcar which belonged to his wife's brother in law. Upon arrival at the scene at Logpond, the second respondent was exiting from the Iswara motorcar and walked to the river bank when he was apprehended by PW5. According to PW5, the second respondent attempted to run away but the trial judge found the evidence of the attempted flee alone was insufficient to infer that the second respondent had knowledge of the drugs in exh. P37.

[15] The liability of the first respondent cannot be fastened or imputed to the second respondent based on the principle of common intention under s. 34 of the Penal Code as there was insufficient evidence to prove any pre-arranged or pre-concerted plan. Neither had common intention arisen on the spot at the scene.

[16] Having found the above, the trial judge, at the close of the prosecution's case, reduced the trafficking charge against the first respondent to one of possession punishable under s. 39A(2) of the Act. The first respondent pleaded guilty to the reduced charge and he was sentenced to 17 years imprisonment from the date of arrest and ten strokes of whipping. The first respondent also pleaded guilty to the amended charge of possession punishable under s. 12(3) of the Act and he was sentenced to six months imprisonment to run from the date of arrest.

[17] As regard the second respondent, the trial judge found there was no evidence adduced by the prosecution to prove that the second respondent was in custody or control and having possession of the impugned drugs and thus, no *prima facie* case had been established against him. The second respondent was acquitted and discharged without calling for his defence.

The Appeal

[18] Learned deputy canvassed two issues before us. Firstly, the second respondent was at all material time, the driver of the Iswara motorcar. Exhibit P37 containing the drugs was seized from the floor of the front passenger seat where the first respondent was seated. Exhibit P37 was very close to the first respondent's legs. The first respondent's clothings were also seized from inside P37. The first respondent and the second respondent were therefore had custody or control and knowledge of the drugs in exh. P37. Learned deputy sought the *ratio* in the Court of Appeal case of *Jonaidi Mansor v. PP* [2002] 1 CLJ 730 at p. 733 and the presumption of possession under s. 37(d) of the Act, to be applied in this situation.

[19] Secondly, learned deputy also submitted that the second and first respondents had common intention to traffic in dangerous drugs by "transporting" under s. 2 of the Act. Rosli bin Dalang, (PW3) was the owner of the Iswara motorcar. It would appear that PW3 intended to sell his motorcar. PW3 handed over the said motorcar to the second respondent as the latter said he had a potential buyer to the Iswara motorcar. The second

respondent came with an unidentified person to fetch the motorcar from PW3. According to PW3, he last used the said motorcar three days before the motorcar was detained by the police. While in his custody, PW3 kept the said motorcar under lock and key. The impugned drugs found in the motorcar was not his (ie PW3). As both the second and first respondents attempted to flee at the time of their arrest, common intention had arisen in that, both of them had knowledge of the drugs in the motorcar. The Court of Appeal cases of *PP v. Mohd Bandar Shah Nordin & Anor* [2008] 4 CLJ 859, *Jamaluddin Saad & Anor v. PP* [2013] 1 LNS 481 and *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65 were cited by learned deputy to support his contention.

Our Decision

[20] We are mindful that the prosecution has now filed an appeal to the Federal Court against our decision to confirm the order of acquittal of the second respondent at the close of the prosecution's case which was on the basis that no *prima facie* case has been made out against him.

[21] Before we embark upon a consideration of the evidence against the second respondent, firstly we need to state our decision against the first respondent. We did not agree with the trial judge that the prosecution has not proved trafficking by "transporting" which was the reason for the reduction of the trafficking charge against the first respondent at the close of the prosecution's case to one of possession under s. 39A(2) of the Act. We were of the view that the prosecution has proved its case of trafficking against the first respondent by transporting under s. 2 of the Act. We, had therefore, set aside the decision of the trial judge reducing the charge under s. 39A(2) of the Act and ordered the case against the first respondent be remitted back to the High Court for his defence to be called on an amended trafficking charge under s. 39B(1)(a) of the Act (as was read out in court).

[22] As against the second respondent, it was the trial judge's decision that the prosecution had failed to prove that he was in possession of the impugned drugs. At p. 193 of the appeal record, the question was posed: whether the first and second respondents were in possession of the drugs in exh. P37 pursuant to a common intention? The fitting exercise of the clothings found in exh. P37 were carried out on both the respondents. The clothings did not fit the second respondent but fitted the first respondent. It is reasonable to infer that the clothings together with the drugs in exh. P37 belonged to or were in the possession of the first respondent only. The trial judge observed as follows:

> This bag was found on the floor of the front passenger seat where the 1st accused (1st respondent) was seated. Although it was closed, it was unlocked and could therefore be easily unzipped by the 1st accused (1st respondent) to notice the content in the said bag. This bag also contained, in addition to the two (2) packets of Ali Café, some clothings. Body fit of these clothings were carried out on both the accused (1st and 2nd respondent) and it was found that the clothings seemed to fit the 1st accused (1st respondent) well but not the 2nd accused (2nd respondent).

[23] The trial judge went on to consider whether the second respondent had custody or control and therefore possession of the drugs in exh. P37 and common intention to traffic in the said drugs. At p. 196 of the appeal record, His Lordship wrote:

> As against the 2nd accused, apart from the P.P.'s contention of common intention (infra) and the fact that he was driving the car (P11), I find absolutely no evidence being adduced by the P.P. to prove that the 2nd accused had custody or control of the drugs in the black Quiksilver bag. Evidence only shows that he had taken the said Proton Iswara car from the brother-in-law of his wife who intended to sell the car and he had driven the said car to the scene at Logpond. At the scene, he was allegedly seen to have alighted from the car and walked towards the river bank. Although PW 5 said in evidence that the 2nd accused attempted to run away when confronted by PW5, I do not find that even accepting PW5's evidence that itself is sufficient to constitute an overt act to allow this court to infer or imply custody or control or knowledge of the existence of drug in the black Quiksilver bag. Moreover, this evidence of PW5 seems to be contradicted by the evidence of PW2 who said that the 2nd accused was arrested outside the car but without any evidence to explain as to where the 2nd accused was actually arrested. Was 2nd accused arrested just outside the car or was he arrested near the stall structure towards the jetty or the river bank and whether 2nd accused had tried to run away when he was arrested by PW5? This doubt which was not erased by the PP must be resolved in favour of the 2nd accused; see the cited case of *Tai Chai Keh v. PP* [1948-49] MLJ Supp.105, 108 where Laville J held that where there is more than one inference, the inference most favourable to the accused should be adopted. To reiterate, there is also absolutely no evidence that the 2nd accused was in whatever way linked to the black Quiksilver bag and the drugs in the Ali Café packets therein or any knowledge thereof apart from the mere fact that he was the driver of the green Proton Iswara.
>
> On the totality of evidence and upon a finding of fact, I find that PP has failed to prove a *prima facie* case against the 2nd accused of custody or control of the said drugs for the presumption under section 37(d) of the DDA 1952 to be invoked against the 2nd accused.

[24] The above passage showed that the trial judge made a finding of fact that there was insufficient evidence adduced by the prosecution to prove that the second respondent was in custody or control of the drugs in exh. P37. The trial judge also entertained serious doubt regarding the exact spot the second respondent was arrested and whether the second respondent did actually make an attempt to escape at the time of his arrest by PW5. The evidence of PW5 had contradicted the evidence of PW2 on this issue. The second respondent, other than being the driver of the Iswara motorcar, there was no other evidence to show the second respondent's nexus with exh. P37 and also his knowledge of the drugs in exh. P37. On the totality of the evidence the trial judge found that the prosecution failed to prove presumed knowledge under s. 37(d) of the Act against the second respondent. The prosecution evidence and the circumstances of the case was completely

A lacking to establish common intention between the second and the first respondent to jointly traffic in the drugs methamphetamines. In *Mohamad Yazri Minhat*'s case, *supra*, Gopal Sri Ram JCA (as he then was) summarised trafficking by way of "transporting" as follows:

> To summarise, the fact that the accused is transporting a quantity of drugs
B from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into.

[25] We did not find the trial judge to be in error and agreed that on the
C totality of the evidence adduced, the prosecution had failed to prove custody or control and presumed knowledge of the drugs under s. 36(d) of the Act against the second respondent, let alone to fasten the second respondent with any 'common intention'. The trial judge decision to acquit the second respondent at the close of the prosecution's case was correct as no *prima facie*
D case of trafficking had been proven.

[26] Accordingly, we affirmed the second respondent's acquittal without having to call for his defence.

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